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CHARLES ELMORE CROPLEY

Supreme Court of the United States.

OCTOBER TERM, 1945.

No. 1129.

HELENE A. JESIONOWSKI, ADMINISTRATRIX,
Petitioner,

v.

BOSTON AND MAINE RAILROAD.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Circuit Court of Appeals for the First Circuit, which is not yet reported, appears in the record at pages 119-123.

Jurisdiction.

The District Court of the United States had jurisdiction of the cause of action under the Federal Employers' Liability Act, U.S.C. Title 45, c. 2, §§ 51 *seq.*; the Circuit Court of Appeals had appellate jurisdiction to review by appeal the final decision of the District Court under U.S.C. Title 28, § 225, and this court has jurisdiction under U.S.C. Title 28, § 347 (Judicial Code, § 240 (a), as amended by the Act of February 13, 1925).

Statement of the Case.

This is an action of tort brought under the provisions of an Act of Congress approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases" (U.S.C. Title 45, §§ 51 *seq.*), as amended, for the death of an employee of the defendant, the plaintiff's intestate, on July 1, 1944, while he was engaged in a switching operation in the defendant's freight yards near Lynn, Massachusetts (R. pp. 1-3, 4-5).

Hereinafter the petitioner, Helene A. Jesionowski, Administratrix, will be referred to as the plaintiff, and the respondent, Boston and Maine Railroad, will be referred to as the defendant.

The writ was filed October 18, 1944 (R. p. 1).

The complaint (R. pp. 1-3, 4-5) contains two counts. The first count alleges in substance that on July 1, 1944, while the plaintiff's decedent was employed as a brakeman on a train of the defendant at Lynn, Massachusetts, it became his duty to take part in a switching operation, which required him to ride upon a freight car which was one of a string of freight cars which was being pushed in upon a siding by a locomotive of the defendant; that by reason of a defect or insufficiency, due to the negligence of the defendant, in its car, track, or roadbed, the car upon which the plaintiff's decedent was riding was derailed, and as a result of the derailment the decedent was thrown from the car upon which he was riding under its wheels and instantly killed. The second count, added by amendment (R. pp. 4-5), alleges in substance that the decedent's death resulted from the derailment of the car upon which he was riding, and that the derailment resulted from negligence of the defendant, without specifying any particular negligence.

The defendant's answer appears at pages 3-4, 5-6 of the record.

The case was tried before Ford, J., and a jury on May 1 and 2, 1945 (R. p. 6), in the District Court of the United States for the District of Massachusetts.

At the close of the evidence the defendant duly and seasonably filed a motion for a directed verdict on each count (R. pp. 6-8). This motion was allowed on the first count and denied on the second count (R. pp. 6, 97), and the defendant's exception was saved (R. p. 97).

The defendant duly and seasonably requested the court to give certain instructions to the jury (R. p. 113), among which are the following:

> "6. The doctrine of *res ipsa loquitur* is not applicable to the facts of this case.
>
> "7. The plaintiff's intestate had control of the switch at the time of the accident.
>
> "14. There is no evidence which would warrant a finding that the derailment was due to negligence of the defendant."

These instructions the court refused to give, and to this refusal the defendant duly excepted (R. p. 109).

On the first count of the complaint the jury returned a verdict for the defendant by direction of the court (R. pp. 6, 9, 97-98), and judgment for the defendant was entered on this count (R. p. 9). On the second count of the complaint the jury returned a verdict for the plaintiff in the sum of $20,000 (R. p. 9), and judgment was entered for the plaintiff on the second count in this sum with costs (R. p. 9).

From the judgment for the plaintiff on the second count the defendant claimed an appeal to the Circuit Court of Appeals for the First Circuit (R. pp. 9, 114), and on April 1, 1946, the Circuit Court of Appeals for the First Circuit reversed the judgment of the District Court; and judgment for the defendant was entered (R. p. 123).

Statement of Facts.

The only eye-witness to the accident was Harrison I. Whitney, who was called as a witness by the plaintiff (R. p. 10). At the trial Whitney testified that he was a locomotive engineer employed by the Boston and Maine Railroad; that he recalled that there was an accident about 5.30 in the morning on July 1, 1944, which was a clear day; that after he went by West Lynn he brought the train, with forty-nine cars, to a stop (R. p. 10); that Jesionowski was the brakeman, and he went back to cut off four cars; that he had been riding with the witness in the cab of the engine up to that point; that after a time he (the witness) got the go-ahead motion by lantern and started along (R. p. 11); that he continued to go ahead towards the Saugus River until he got from Jesionowski a lantern signal to stop (R. pp. 11-12, 22); that when he stopped in response to that lantern signal the front of his locomotive was at a switch point or cross-over near the Saugus River, marked "A" on a plan (R. p. 22) introduced in evidence and marked "Exhibit 1" (R. pp. 49, 111); that he then saw Jesionowski go towards the switch stand (R. pp. 12, 23); that the switch stand was at a point on the plan marked "B"; that when Jesionowski came from that point back toward the car he (the witness) got a signal to back, and he started backing (R. pp. 12, 23); that he next saw Jesionowski on the side of one of the freight cars and he (Jesionowski) gave a second signal to back (R. pp.

13, 23); that he (the witness) had already started backing by the time he got the second signal from Jesionowski; that in making his movements forward, in stopping, and in backing, he relied on the signals which he got from Jesionowski (R. p. 23); that he had backed about three car lengths when he saw splinters going in the air (R. pp. 13, 23); that he then stopped the locomotive within 15 or 20 feet (R. p. 15), and went across the cab to look out on the fireman's side and saw that the cars were in a U-shape; that he immediately went back on the north side to see what had taken place and found one end of the car was on the main line and the other on the north siding, so there was a derailment of that fourth car from the engine (R. pp. 15, 25-26); that he examined the switch (R. p. 16), and observed that the switch was set for the north siding (R. p. 17), and with reference to the switch stand he observed that the handle was down and the lock was in place but not locked; that that was the customary thing because the brakeman (Jesionowski) was going to let him out and then throw the switch again later (R. pp. 17-18); that on the day before he had used the same switch and it worked properly, and on the next day he operated a train over it and it worked properly then (R. p. 20). The witness further testified (R. p. 22) that the length of the locomotive was about 80 feet; that these freight cars were about 40 feet, with a space between the cars for coupling purposes about 18 inches (R. p. 22); that the total length of the train was about 246 feet (R. p. 31); that when he finally stopped after the derailment, the front of the locomotive was near the switch stand, which is marked "B" on the plan (Exhibit 1, R. p. 111) (R. p. 24); that he was backing the train about 5 miles an hour (R. pp. 14, 26).

Earl M. Harvey, called by the defendant (R. p. 33), testified (R. p. 33) that he was a civil engineer for the Boston

and Maine Railroad; that the plan (Exhibit 1, R. p. 111) was made by him, based upon measurements and a survey which he personally made (R. p. 34); that the frog to the left or towards Lynn from the switch point marked "B" is 75½ feet from the point marked "B" (R. p. 36); that the switch point, operated by means of the switching device (R. p. 39), was 15 feet long (R. pp. 37, 38, 40); that the rear car of the string of four cars was 44 feet 9 inches from the end of one knuckle to the other knuckle (R. pp. 43, 44), and the shortest distance between the wheels, on car No. 72643 (the car which was derailed), from truck to truck, was 25 feet 9 inches (R. p. 42); that the distance between the cross-over marked "A" on the plan (Exhibit 1, R. p. 111) and the switch point marked "B" on the plan is 224 feet, and that was based on his measurements (R. p. 35).

John F. Sweeney, the defendant's trainmaster (R. p. 62), testified (R. p. 62) that on the morning of the accident in which Mr. Jesionowski was involved he went to the scene of the accident, and arrived there about 6.20; that he found the rear truck of the leading car, as it was backed, was on the west-bound main track; that the leading truck was not derailed (R. p. 63); that the trucks of that car nearest the engine were derailed (R. p. 63); that he noticed some flange marks on the ties, which commenced 6 or 8 feet west of the frog (R. p. 66); that he had examined a couple of hundred derailments, and he had never known of one being caused by a spring frog (R. p. 69); that he operated the switch both ways, and found that it operated perfectly; that he observed the condition of the roadbed and track, and it seemed all right (R. p. 67).

Francis T. Flynn, the defendant's assistant division engineer (R. p. 72), testified (R. p. 73) that when he got there on the morning of the accident he saw that the lead

trucks of the first car towards Lynn were on the westbound tracks and the rear trucks of that car were on the inside of the north rail of the north siding, and the first trucks of the next car were also derailed inside the south rail of the north siding (R. p. 73); that as a result of seeing these cars there he went to the switch stand, indicated on the plan near "B" (Exhibit 1, R. p. 111); that it was a hand switch; that he took the switch stand and threw the lever to open up the line to see whether the switch points fitted close to the stock rail and he found that in both cases they did (R. p. 75); that the switch points were 15 feet long (R. p. 75); that he found the tip of the switch point was close against the main-line track; that he then tried it on the side track and threw the switch back to its original position and it fitted again; that he found when he threw the switch back and forth that it worked all right (R. p. 75); that he could not find any derailment marks on the main line, so he went down on the side track and found wheel marks on the top of the rail at a distance of 69 feet from the switch point marked "B," going towards Lynn, on the switch-point side of the frog; that he traced those marks and found they continued 170 feet from the first mark 69 feet from the switch point (R. pp. 76-77), which would be about 6½ feet before you reached the frog going from the point of the switch (R. p. 83); that the two front bolts on the frog were damaged and the spring bolt was dented (R. p. 83); that the wheels when they became derailed passed over and made marks where they passed over the bolt or spring and continued on to the marks beyond it; that the wheels of the car clipped the bolt heads (R. p. 85).

John F. Brady, a section foreman for the Boston and Maine Railroad (R. p. 91), testified (R. pp. 91-92) that he went to the scene of the accident on the morning it hap-

pened; that the first thing he did was to examine the switch; that he moved it himself and found the operation of the switch "was O.K."; that the points of the switch all fitted close to the stock rail; that no repairs to that switch had been made after the accident.

Leonard A. Casey, the defendant's track supervisor (R. p. 93), testified (R. p. 94) that he went to the scene of the accident on the morning the accident happened; that the first thing he did was to go to the switch stand and make a check on it; that he threw the switch back and forth and left it in its normal position; that he found the condition of the switch "was 100%, in very good shape" (R. p. 94); that he went to work and checked the roadbed and also the track; that 6 to 8 feet ahead of the point of the frog he found a mark on the rails and also some marks on the ties; that that mark continued right along the side track for quite a little distance (R. p. 94); that the only damage he found on the frog was right at the joint where it locks into the running rail; two of the plates were marked there; that there was a nick on the top of the nut, a flange mark, and the mark continued on and hit the spring of the frog, which is the bolt that goes through the frog, and bent that (R. p. 95).

Question Presented.

The plaintiff's specifications of errors (Petition, pp. 5 and 6) raise one fundamental question:

WAS THE CIRCUIT COURT OF APPEALS IN ERROR IN RULING THAT THE DOCTRINE OF RES IPSA LOQUITUR WAS NOT APPLICABLE TO THE FACTS OF THIS CASE?

Argument.

THE CIRCUIT COURT OF APPEALS WAS NOT IN ERROR IN RULING THAT THE DOCTRINE OF RES IPSA LOQUITUR WAS NOT APPLICABLE TO THE FACTS OF THIS CASE.

I. Under the Federal Employers' Liability Act (U.S.C. Title 45, c. 2, § 51) liability arises from negligence, and that negligence must be the cause of the injury.

Tiller v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 67.
Atchison, T. & S.F. Ry. Co. v. *Toops*, 281 U.S. 351, 354-355.
Baltimore & Ohio R. Co. v. *Berry*, 286 U.S. 272, 276.

And the burden of proving negligence is on the plaintiff.

Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333, 343.
Baltimore & Ohio R. Co. v. *Berry*, 286 U.S. 272, 276.
St. Louis &c. Ry. v. *Mills*, 271 U.S. 344, 347.
Looney v. *Metropolitan R. Co.*, 200 U.S. 480, 487-488.
Chicago, M. & St. P. Ry. v. *Coogan*, 271 U.S. 472, 478.
Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663.
Reading Co. v. *Boyer*, 6 Fed. (2) 185, 186.
Payne v. *Boucher*, 270 Fed. 38, 40.
Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152, 161.
Robertson v. *Chicago &c. Ry. Co.*, 225 N.W. 160, 161-162 (Minn.).

A mere scintilla of evidence is not sufficient.

Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333, 343.

II. Since there was no direct evidence of negligence, the plaintiff invokes the doctrine of *res ipsa loquitur*.

1. This doctrine has been defined in a number of cases.

Sweeney v. *Erving*, 228 U.S. 233, 240.
San Juan Light & Transit Co. v. *Requena*, 224 U.S. 89, 98-99.
McCabe v. *Boston Consol. Gas Co.*, 314 Mass. 493, 496.
Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152.
Minihan v. *Boston Elevated Ry.*, 197 Mass. 367.
1 Shearman & Redfield, Negligence (Rev. Ed.) pp. 150, 152, § 56.

In *Sweeney* v. *Erving*, 228 U.S. 233, the court said at page 240:

> "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur, where it applies,* does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff." (Italics ours.)

In *San Juan Light & Transit Co.* v. *Requena*, 224 U.S. 89, 98-99, the court said:

> ". . . when a thing which causes injury, without fault of the injured person, is shown to be under the *exclusive control of the defendant*, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of explanation, that the injury arose from the defendant's want of care." (Italics ours.)

The rule deducible from all the cases is well stated in 1 Shearman & Redfield, Negligence (Rev. Ed.) p. 152, § 56:

> "Circumstantial evidence is insufficient . . . where the circumstances are consistent with freedom from wrong. The doctrine of res ipsa loquitur, which is 'a common-sense appraisal of the probative value of circumstantial evidence', requires evidence which shows at least the *probability* that a particular accident could not have occurred without legal wrong by the defendant. *The inference of negligence must be the only one* that can fairly and reasonably be drawn from the attendant circumstances." (Italics ours.)

2. Application of the doctrine has often been considered by courts of last resort.

There is no difficulty in applying the doctrine in the case of a passenger injured by reason of a derailment. This is so both because of the high degree of care owed to a passenger and because of the fact that the passenger has no control of the instrumentality causing his injury.

> *Kay* v. *Metropolitan St. Ry. Co.*, 163 N.Y. 447, 453 (cited with approval in *Sweeney* v. *Erving*, 228 U.S. 233, 240-241).

Gilchrist v. *Boston Elevated Ry.*, 272 Mass. 346.
See *Patton* v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, and cases cited at page 663.
1 Shearman & Redfield, Negligence (Rev. Ed.) p. 152.

There is a difference, however, in the application of the doctrine in employee cases.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663.
Texas & Pacific Ry. Co. v. *Barrett*, 166 U.S. 617.
Minneapolis & St. Louis R.R. Co. v. *Gotschall*, 244 U.S. 66, 67.
Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152, 162.
Curtin v. *Boston Elevated Ry.*, 194 Mass. 260, 264.

In *Patton* v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, the court said at page 663:

> ". . . while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely, . . . *a different rule obtains as to an employé.* The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence." (Italics ours.)

The doctrine of *res ipsa loquitur* is a doctrine of limited application.

United States v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, 698.

Plumb v. *Richmond, L. & R.R. Co.*, 233 N.Y. 285, 288.

1 Shearman & Redfield, § 56, p. 150.

In *United States* v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, the court said at page 698:

> "The doctrine of res ipsa loquitur is *restricted in its application* to cases where the defendant had exclusive control of the thing which caused the injury, the party injured was without fault, and the injury was such as in the ordinary course of things would not have occurred if the one having such control had used proper care. In the absence of an explanation in such cases, the court may presume that the injury arose from the defendant's want of care, but the presumption does not reasonably follow unless all other conclusions are fairly excluded." (Italics ours.)

(a) In a suit by an employee against an employer, the doctrine is never applicable *unless the instrumentality or instrumentalities involved are, at the time of the accident, under the exclusive control, direction, management, or operation of the defendant.*

San Juan Light & Transit Co. v. *Requena*, 224 U.S. 89, 98-99.

United States v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, 698.

Bonner v. *Texas Co.*, 89 Fed. (2) 291, 294.

Gray v. *Baltimore & Ohio R. Co.*, 24 Fed. (2) 671.

Asprodites v. *Standard Fruit & S.S. Co.*, 108 Fed. (2) 728, 729.

Courtney v. *N.Y., N.H. & H. R.R.*, 213 Fed. 388, 390.

Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152, 162.

Pittsley v. *Allen*, 297 Mass. 83, 85.

Lonergan v. *American Ry. Ex. Co.*, 250 Mass. 30, 36.

Reardon v. *Boston Elevated Ry.*, 247 Mass. 124, and cases collected.

Massa v. *Nippon Yusen Kaisha*, 264 N.Y. 283, 284-285.

Henson v. *Lehigh Valley R.R. Co.*, 194 N.Y. 205.

Lennon v. *Rawitzer*, 57 Conn. 583, 587.

Texas & Pacific Coal Co. v. *Kowsikowsiki* 103 Tex. 173, 174-175.

Dryden v. *Western Pacific R. Co.*, 1 Cal. App. (2) 49.

Pekin Wood Products Co. v. *Burkhardt*, 192 Ark. 1025.

In *San Juan Light & Transit Co.* v. *Requena*, 224 U.S. 89, the court said at pages 98-99:

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In *Bonner* v. *Texas Co.*, 89 Fed. (2) 291, the court said at page 294:

> "Res ipsa loquitur does not help, for that doctrine applies only when the instrumentalities causing injury are shown to have been *wholly in the care of defendant*, and not to have been meddled with by the person injured or outsiders." (Italics ours.)

In *Gray* v. *Baltimore & Ohio R. Co.*, 24 Fed. (2) 671, the court said at page 673:

> "The switch was taken under the *control of the negro* at the time he sawed the lock, and from that time until the wreck *it cannot be said that it was solely under the control of the defendant.*" (Italics ours.)

In *Massa* v. *Nippon Yusen Kaisha*, 264 N.Y. 283, the court said at pages 284-285:

> "*The first item of proof necessary to bring this rule into action is that the thing is shown to be under the management of the defendant.*" (Italics ours.)

In *Lennon* v. *Rawitzer*, 57 Conn. 583, the court said at page 587:

> ". . . there are several conditions which are essential to lay the foundation for any presumption. One is that the thing must be *under the management of the defendant or his servants.* Here the actual management at the time was controlled by the plaintiff, which would at least require caution in applying the rule, lest the plaintiff's own carelessness be visited on the defendants." (Italics ours.)

In the case at bar the evidence shows that this was a hand switch (R. pp. 16-17, 39, 75), operated by the intestate (R. pp. 12, 23), and there is no evidence that anyone touched the switch after the intestate had thrown it for the switching movement of the train onto the side track. The plaintiff's only witness to the accident, Whitney, the locomotive engineer, testified (R. p. 17) that after the accident he examined the switch and observed that the switch was set for the north siding, and with reference to the switch stand he observed that the handle was down and the lock was in place but not locked; that that was the customary thing because the brakeman (Jesionowski) was going to let him out and then throw the switch again later (R. pp. 17-18). Accordingly the judge instructed the jury (R. p. 104): "Now there is no question that the deceased had control of the switch for the purpose of directing the movement of the cars . . ."

Since there was no objection or exception, this became the law of the case.

S. E. Rand Transportation Co. v. *Boston & Maine R.R.*, 273 Mass. 327, 329, 332.
Dunbar v. *Ferrera Bros. Inc.*, 306 Mass. 90, 91.

Prondecka v. *Turners Falls Power & Elec. Co.*, 238 Mass. 239, 241.

Arabia v. *John Hancock Mut. Life Ins. Co.*, 301 Mass. 397, 401.

Santa Maria v. *Trotto*, 297 Mass. 442, 446-447.

On the facts just stated, the doctrine of *res ipsa loquitur* is not applicable to this case, and the Circuit Court of Appeals was correct in the following statement (R. p. 123):

> "Thus an essential element of the principle of *res ipsa loquitur* is that the defendant have exclusive control of the thing causing the injury. Such essential element is not clear in this case."

(*b*) Nor can an employee rely upon the application of the doctrine in cases in which the accident *may have happened without fault on the part of the employer.*

New York Central R. Co. v. *Ambrose*, 280 U.S. 486, 490.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663-664.

Courtney v. *N.Y., N.H. & H. R.R.*, 213 Fed. 388, 390 (cited with approval in *Lynch* v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152, 163).

Massa v. *Nippon Yusen Kaisha*, 264 N.Y. 283, 284-285.

Francey v. *Rutland R.R. Co.*, 222 N.Y. 482, 485-486.

Texas & Pacific Coal Co. v. *Kowsikowsiki*, 103 Tex. 173, 174-175.

Klingman v. *Loew's Inc.*, 296 N.W. 528, 531.

Kid v. *Coahuila Lead & Zinc Co.*, 204 S.W. 284, 286, 287, and cases cited.

In *New York Central R. Co.* v. *Ambrose*, 280 U.S. 486, the court said at page 490:

> "The utmost that can be said is, that *the accident may have resulted from any one of several causes*, for some of which the company was responsible, and for some of which it was not. This is not enough. See *Patton* v. *Texas & Pacific R. Co.*, 179 U. S. 658, where, at page 663, this court said: 'The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. . . . *it is not sufficient for the employé to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was.* And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.'" (Italics ours.)

In *Courtney* v. *N.Y., N.H. & H. R.R.*, 213 Fed. 388, the court said at page 390:

> "The maxim res ipsa loquitur does not apply where the accident *might have been due to improper handling*

as well as to improper furnishing the thing causing the accident." (Italics ours.)

In *Massa* v. *Nippon Yusen Kaisha*, 264 N.Y. 283, the court said at page 285:

"There is no presumption that the defendant was lacking in proper care in furnishing proper appliances when *the accident might have happened* through the carelessness of some member of the *stevedore's gang.*" (Italics ours.)

In *Francey* v. *Rutland R.R. Co.*, 222 N.Y. 482, the court said at pages 485-486:

"The mere happening of the accident did not necessarily exclude the inference that it might have been caused by the negligence of the plaintiff, or without any negligence at all. It was, therefore, necessary for the plaintiff to supplement the proof of the accident with evidence tending to show that it resulted from the failure of the defendant to exercise ordinary care, either in the selection of the engine or in keeping it in reasonably safe repair.

"In the present case the proof at the conclusion of the evidence was such that *the jury might have found the accident was due to either one of two causes*—negligence on the part of defendant in failing to keep the locomotive in repair, or to the negligence of the plaintiff in letting cold water into the boiler in the condition in which it was at the time the explosion took place. Before the plaintiff could recover, therefore, the burden was upon him to prove that the accident was due *solely* to the first cause. If it were just as probable that the explosion was due to one cause as the other, then he necessarily must fail in the action." (Italics ours.)

In *Texas & Pacific Coal Co.* v. *Kowsikowsiki*, 103 Tex. 173 (*a case directly in point*), the court said at pages 174-175:

> "'Where the particular thing causing the injury has been shown to be under the management of the defendant, or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose for want of care.'
>
> "This would probably be an eminently just conclusion if the assumption upon which it is founded were just, viz., that the evidence shows that the particular thing which caused the death in question was under the exclusive management and control of the defendant. The derailment of the car, unexplained, is a fact which by its very nature may be admitted to suggest something amiss, a want of proper precaution somewhere. But what was the cause of the derailment? Until we can answer that question, we think it must be admitted that it is not shown by the evidence that the particular thing which caused this injury was in the exclusive management of the defendant. If everything that could reasonably be assigned as the cause of the derailment had been wholly under the control of servants of defendant other than the deceased himself, it might be inferred that the cause, whatever it was, consisted in some negligent act or omission of theirs. *But we have a track, with its switches, and a motor car, defects in, or negligent management of, any of which might have brought about that which happened. The deceased himself had a hand in the management of the switches, and also in controlling the movements of the car, in so far as it depended on the giving of signals.* Negligence is

not to be imputed either to him or to the defendant's other servants without proof; and a state of facts in which the cause of the accident cannot be found does not warrant a conclusion that one, rather than the other, produced it. We cannot presume in favor of one against the other. Evidence must be brought by a plaintiff, having the burden of proof, sufficient to justify an inference of negligence on the part of the defendant, and none such can be drawn from an occurrence which, while indicating negligence somewhere, is as consistent with the hypothesis that it was his own, or that of one in whose right he sues, as it was that of the other party." (Italics ours.)

In *Klingman* v. *Loew's Inc.*, 296 N.W. 528 (Minn.), the court said at page 531:

"The circumstances must exclude any reasonable probability that the fault of the one seeking to invoke it (the doctrine of *res ipsa loquitur*) contributed to the result of which he complains."

In *Kid* v. *Coahuila Lead & Zinc Co.*, 204 S.W. 284 (Mo.), the court said:

"Where the evidence is circumstantial only and reveals a state of facts from which the inference could as reasonably be drawn that the accident was due to a cause or causes other than one tainted with the defendant's negligence, then the plaintiff cannot recover. *Wilkerson* v. *Railroad Co.*, 140 Mo. App. 306, 320.

"In *Byerly* v. *Light & Power Co.*, 130 Mo. App. 593, the court said: 'Where the evidence shows the injury may have been caused by the negligent act, but in its aspect most favorable to the plaintiff is just as consistent with the inference that *the injury might have*

been produced by another cause, to send the case to the jury would be to accord them the right to make an arbitrary choice between two equally probable, but unproved conclusions, and thus the verdict, if for the plaintiff, would be based not entirely on evidence, but in part on mere speculation and conjecture. This would mean a reversal of the rule imposing the burden of proof on the plaintiff, since the defendant, in order to prevent the jury from making him the victim of conjecture would be forced to assume the burden of showing that his negligence did not produce the injury.'

"*Where there are two or more possible causes for an accident,* each shown by circumstantial evidence only, and the one might just as reasonably and certainly be inferred from the evidence as the other, then the jury cannot be allowed to attribute it to the one tainted with negligence rather than the other, for to do so is mere speculation. This is merely an application of the oft-repeated rule stated in *Warner v. Railroad,* 178 Mo. 125, 133, that: 'If the injury *may have resulted from one of two causes,* for one of which, and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result, and if the evidence leaves it to conjecture, the plaintiff must fail in his action.' "

And at page 287:

"The rule which we applied is also stated in *Rogers* v. *Packing Co.,* 180 Mo. App. 227, 236, as follows: 'In a case where the injury *might have resulted from one of several causes,* for one of which the defendant is liable and for the others he is not liable, it is incumbent upon the plaintiff to prove his case by showing that the in-

jury arose from that cause for which the defendant is liable.' "

(*c*) In the case at bar the plaintiff's uncontradicted evidence shows, not only that the accident *may have happened through no negligence of the defendant, but that it probably resulted from the intestate's own conduct.* The plaintiff's witness Whitney, the locomotive engineer (R. p. 10), the only eye-witness to the accident, testified (R. pp. 11, 22) that Jesionowski, the brakeman, had been riding with him in the cab of the engine, and he went back to cut off four cars so he then had four freight cars and a locomotive which were to go forward toward the Saugus River (R. p. 22); that after Jesionowski had cut the four cars off he (the witness) received a lantern signal to go ahead (R. pp. 11, 22), and he continued to go ahead towards the Saugus River until he got from Jesionowski a signal to stop; that when he stopped in response to that lantern signal the front of his locomotive was at a switch point or cross-over near the Saugus River at the point marked "A" on the plan (Exhibit 1, R. p. 111) (R. p. 22). The witness Whitney further testified (R. p. 22) that the length of the locomotive was about 80 feet and those freight cars were about 40 feet, with a space between the cars for coupling purposes about 18 inches (R. p. 22); that the total length of the train was about 246 feet (R. p. 31); that when he finally came to a stop, after the derailment, the front of the locomotive was near the switch stand, which is marked "B" on the plan (Exhibit 1, R. p. 111) (R. p. 24); that he got off the locomotive and went back and found one end of the car was on the main line and the other end was on the north siding, so there was a derailment of that fourth car from the engine (R. pp. 15, 25-26); that he examined the switch (R. p. 16) and observed that the switch was set for the north siding (R.

p. 17), and with reference to the switch stand he observed that the handle was down and the lock was in place but not locked; that that was the customary thing, *because the brakeman* (Jesionowski) *was going to let him out and then throw the switch again later* (R. pp. 17-18); that in making the movements forward, in stopping, and in backing he relied on the signals he got from Jesionowski (R. p. 23). There was evidence that the distance between the cross-over marked "A" on the plan (Exhibit 1, R. p. 111) and the switch stand marked "B" on the plan was 224 feet (R. p. 35). Mathematical calculation shows that with the front of the locomotive stopped at point "A" in response to Jesionowski's signals, with the over-all length of the engine and four cars about 246 feet (R. p. 31), the rear of the last car would be 22 feet beyond the switch toward Lynn, that is, short of the switch. The switch point was 15 feet long (R. pp. 37, 38); on the freight car which was derailed the distance between the two sets of trucks was 25 feet 9 inches (R. p. 42); and the length of this freight car was 44 feet 9 inches (R. p. 43). There was sufficient space underneath this last car for the switch point to operate easily, and the probability is that while the car was in this position, with the wheels still on the main track straddling the switch point, Jesionowski threw the hand switch and then gave the motion to back. The result of this operation would be that the lead trucks would back along the main track—and it is significant that these lead trucks were not derailed (R. p. 15, Q. 94; p. 26, X-Q. 223; p. 50, Q. 12; p. 63, Q. 17-18; p. 73, Q. 24)—while the other trucks and the cars following would back along the north siding. In this way the lead car would become derailed; and this is precisely what the evidence shows happened, since the marks of derailment commenced 69 feet beyond the switch toward Lynn and continued for 170 feet beyond (R. pp. 76-77).

Thus the plaintiff's evidence shows, not only that the derailment *may have happened without negligence on the part of the defendant, but that it probably resulted from the conduct of the intestate, who operated the switch and controlled the situation.* The intestate signaled the engineer where to stop before he threw the hand switch, and after throwing the switch he gave the engineer the motion to back (R. pp. 12-13, 22-23).

This explanation, based upon the physical facts and simple mathematical calculations, affords a reasonable explanation of the derailment and repels any inference of negligence on the part of the defendant, since under the doctrine of *res ipsa loquitur* "*the inference of negligence must be the only one that can fairly and reasonably be drawn from the attendant circumstances.*"

1 Shearman & Redfield, Negligence (Rev. Ed.) p. 152.

United States v. *Porter Bros. & Biffle*, 95 Fed. (2) 694, 698.

3. Since the inference of negligence of the defendant is not the only inference that can fairly and reasonably be drawn from the circumstances surrounding the derailment, the plaintiff has failed to sustain her burden of proof.

Payne v. *Boucher*, 270 Fed. 38, 40.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663-664.

In *Payne* v. *Boucher*, 270 Fed. 38, the court said at page 40:

> "Negligence of the employer is an affirmative fact to be established by the one speaking for the deceased

employee. . . . Evidence that the employer *may have been guilty of negligence* is not sufficient."

In *Patton* v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, the court said at pages 663-664:

> "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. *Texas & Pacific Railway* v. *Barrett*, 166 U. S. 617. Second. That in the latter case it is not sufficient for the employé to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In this connection the Circuit Court of Appeals in its opinion said (R. p. 122):

> "The 'thing' which caused the injury in our case was within the confines of a compound of several elements, including the stopping of the train to begin the

switching, the giving of the signals, the throwing of the switch, the backing of the train, the condition of the track and track bed, the switch mechanism, the car wheel flanges and other rolling stock equipment. In this compound of elements the railroad corporation was not in exclusive control. Jesionowski was in control of important elements. In a very practical sense he, and not the corporation, was in control of very important elements, for he alone was in a position to observe; and it was his duty to observe and require the train to pull forward far enough for all of the wheels of the fourth car to clear the switch points before signaling the engineer to stop the forward movement, and the same duty continued after throwing the switch and before giving the signal to back.

"The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. It was the jury's duty to determine the cause of the accident, and since it must make that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of *res ipsa loquitur.*"

This statement of the Circuit Court of Appeals is based upon the decisions of this court and other courts of last resort. A case directly in point on the facts is *Texas & Pacific Coal Co.* v. *Kowsikowsiki*, 103 Tex. 173, 174-175, which is cited with quotations on page 20 of this brief.

Accordingly it has been held by courts of last resort in many jurisdictions that the mere derailment of a car is not evidence of negligence which would warrant recovery by an injured employee.

Texas & Pacific Coal Co. v. *Kowsikowsiki*, 103 Tex. 173, 174-175.

Henson v. *Lehigh Valley R.R. Co.*, 194 N.Y. 205.
Keogh v. *South Buffalo Ry. Co.*, 233 N.Y. 31.
Lockwood, Admr., v. *Chicago &c. Ry. Co.*, 55 Wis. 50, 53.
Robertson v. *Chicago &c. Ry. Co.*, 225 N.W. 160 (Minn.).
Lynch v. *N.Y., N.H. & H. R.R.*, 294 Mass. 152, 162.

The case of *Terminal R. Assn. of St. Louis* v. *Staengel*, 122 F. (2) 271, is clearly distinguishable. In that case the derailment was caused by an automatic switch, controlled from a switch tower by a servant of the defendant, and not, as in the case at bar, a hand switch operated by the intestate himself. Moreover, in the *Staengel* case all the cars of the freight train had safely passed the switch except the rear wheels of the last car, when concededly the switch jumped. From these facts it could be inferred either that the switchman in the tower threw the lever too soon or that there was some defect in the automatic switch which caused the derailment. From either of these causes negligence of the defendant could be inferred.

In this connection the court said at page 275:

> "In short, this evidence showed an abnormal action of the switch, which action defendant's evidence showed could not have happened with normal functioning and which defendant could not account for nor offer any explanation.
>
> "Even if we take all this evidence as true, it is clear that there must have been some defect in these switch instrumentalities because it did shift to the 11th Street track within a very few seconds after the front trucks of the last car passed over it."

The plaintiff's burden of proof has not been sustained when the record leaves the matter in the realm of speculation and conjecture.

New York Central R. Co. v. *Ambrose*, 280 U.S. 486, 489-490.

Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663.

Mucha v. *Northeastern Crushed Stone Co., Inc.*, 307 Mass. 592, 597.

Curtin v. *Boston Elevated Ry.*, 194 Mass. 260, 264.

Robertson v. *Chicago &c. Ry. Co.*, 225 N.W. 160, 161-162 (Minn.).

Showalter v. *Western Pacific R. Co.*, 16 Cal. (2) 460.

In *New York Central R. Co.* v. *Ambrose*, 280 U.S. 486, the court said at pages 489-490:

> "In any view of the matter, the respondent (plaintiff) upon whom lay the burden, completely failed to prove that the accident was proximately due to the negligence of the company. It follows that the verdict rests only upon speculation and conjecture, and can not be allowed to stand. . . .
>
> "*The utmost that can be said is, that the accident may have resulted from any one of several causes, for some of which the company was responsible, and for some of which it was not. This is not enough.* See *Patton* v. *Texas & Pacific R. Co.*, 179 U.S. 658, . . . 663." (Italics ours.)

In *Mucha* v. *Northeastern Crushed Stone Co., Inc.*, 307 Mass. 592, the court said at page 597:

> "Several conjectures may be indulged in as to the cause of the breaking of the timber, none of which could be attributed to any defect or unsuitableness. It is true that what inferences are to be drawn depend not only upon the fact that the timber broke, but also on the special facts of the case, the circumstances of the occurrence that has caused the injury, and 'the teachings of experience with regard to them.' . . . But this is not a case where the evidence affords a reasonable inference of negligence on the part of the defendant as alleged."

In *Robertson* v. *Chicago &c. Ry. Co.*, 225 N.W. 160 (Minn.), the court said at pages 161-162:

> "Verdicts cannot rest on conjecture. The burden was on plaintiff to show that the accident resulted from defects in the car. It is not enough to show that there may have been defects. The evidence must go further and justify an inference that the accident resulted from the cause alleged rather than from some other cause. *If it is equally probable that the accident resulted from some cause other than the negligence of the defendant, there can be no recovery.* To warrant a recovery the evidence must furnish a reasonable basis for a finding that the accident is more likely to have resulted from the negligence alleged than from other causes." (Italics ours.)

All the cases hold that, where there are a number of conjectures equally consistent with the facts, the jury will not be permitted to select that conjecture which harmonizes with their sympathy.

Moreover, in the case at bar it must be remembered that by its verdict for the defendant on the first count the jury found there was no defect in the car, track, or roadbed, which includes the switch and the frog.

Since, therefore, there was no evidence of negligence on the part of the defendant, and since the doctrine of *res ipsa loquitur* is not applicable to the facts, the jury should not have been allowed to speculate as to the cause of the derailment.

III. The petitioner's arguments do not support her contention that the Circuit Court of Appeals was in error as specified (Petition, pp. 5-6).

1. In discussing the first specification of error (Petitioner's Brief, p. 12) the petitioner contends that the doctrine of *res ipsa loquitur* as stated to the jury by the trial court became the law of the case "because the defendant did not take exception to the statement of rule of *res ipsa* as it was stated to the jury." This contention is without merit. While it is true that the defendant took no exception to the charge of the court, it did take an exception to the court's refusal to give its sixth request (R. p. 113):

> "6. The doctrine of *res ipsa loquitur* is not applicable to the facts of this case."

No exception to the charge was necessary, since the defendant's rights were properly saved by its exception to the court's refusal to grant its request.

Conn. Mutual Life Ins. Co. v. *Hillmon*, 188 U.S. 208, 212-213.

Peirson v. *Boston Elevated Ry.*, 191 Mass. 223, 234.

Ginzler v. *Birmingham*, 6 Ala. App. 666.

In *Conn. Mutual Life Ins. Co.* v. *Hillmon*, 188 U.S. 208, the court said at page 213:

> "It is insisted in behalf of the plaintiff that, as no exception was taken to this part of the charge, its propriety cannot be questioned at this time; but as an exception was properly taken to the refusal of the court to charge . . . , we think there was sufficient to raise the point. . . . Having excepted to the refusal to give a certain instruction, it was not necessary to repeat such exception when the contrary of such request was given in the general charge. As defendant had raised the point in one form, it was not necessary to raise it in another."

In *Peirson* v. *Boston Elevated Ry.*, 191 Mass. 223, the court said at page 234:

> "Nor is it any answer to the respondent's complaint to say that no exception was taken to the manner in which the charge to the jury dealt with this question. The evidence had been admitted subject to the respondent's exception. It had preserved its rights, and was not called upon to ask for any further ruling or to save any further exception upon this subject."

Since the trial judge's charge on the question of *res ipsa loquitur* did not become the law of the case, for the reasons already stated, it was the right and the duty of the Circuit Court of Appeals to apply the law correctly. This the Circuit Court of Appeals did, stating in its opinion (R. p. 122):

> "The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. It was the jury's duty to determine the cause of the accident, and since it must make

that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of *res ipsa loquitur.*"

The District Court was in error in allowing the jury to determine the applicability of the doctrine of *res ipsa loquitur,* for two reasons: First, because the undisputed evidence introduced by the plaintiff shows that the defendant did not have exclusive control of all the instrumentalities and factors involved in the derailment, and secondly, because the evidence leaves it wholly conjectural as to whether the derailment resulted from the conduct of the intestate or from some cause for which the defendant was responsible. The cause of the derailment being thus speculative, as stated, the plaintiff has failed to sustain her burden of proof.

In this connection the petitioner says in her brief (pp. 16-17): "Now it is clear that the burden is on a plaintiff to exonerate himself from all blame. He must be utterly guiltless. It is one of the imperative *conditions precedent* to his right to use the rule of *res ipsa.* Plainly this is a question of fact for the jury." But, as was said by the Circuit Court of Appeals in its opinion (R. p. 122): "It was the jury's duty to determine the cause of the accident . . . without the aid of the doctrine of *res ipsa loquitur.*"

In her brief (p. 16 top) the petitioner quotes the following language from the opinion of the Circuit Court of Appeals:

> "*The possible causal actions leading up to the fatal accident cannot be so separated*"

and then says: "The appellate court does not cite a single authority in support of this ruling." While it is true that

the Circuit Court of Appeals cites no case that has discussed the precise language of its Opinion, it has cited authorities which sustain its ruling. Among other authorities cited by the Circuit Court of Appeals is the case of *Texas & Pacific Coal Co.* v. *Kowsikowsiki*, 103 Tex. 173, in which the court says at pages 174-175:

> "*But we have a track, with its switches, and a motor car, defects in, or negligent management of, any of which might have brought about that which happened. The deceased himself had a hand in the management of the switches, and also in controlling the movements of the car, in so far as it depended on the giving of signals.* . . . Evidence must be brought by a plaintiff, having the burden of proof, sufficient to justify an inference of negligence on the part of the defendant, and none such can be drawn from an occurrence which, while indicating negligence somewhere, is as consistent with the hypothesis that it was his own, or that of one in whose right he sues, as it was that of the other party." (Italics ours.)

On page 17 of her brief the petitioner cites six cases in support of the following statement: "The following cases directly or by necessary implication hold that the plaintiff's freedom from fault is a jury question:"

In *Van Horn* v. *Pacific Refining & Roofing Co.*, 27 Cal. App. 105, 109, the plaintiff was injured by reason of the explosion of a steampipe cap *which was in the exclusive control of the defendant.*

In *Wright* v. *South Counties Gas Co.*, 102 Cal. App. 656, 664, a prospective tenant inspecting an apartment house was injured by a gas explosion. No question of the plaintiff's conduct was involved.

In *Cantley* v. *M., K., T. Railroad Co.*, 353 Mo. 605, there was an issue of fact as to whether or not the speed of the engine at a curve caused the derailment, the plaintiff having nothing to do with the operation of the engine.

In *Graham* v. *Badger*, 164 Mass. 42, 48, an employee was injured by the fall of a staging due to the breaking of a defective rope. Since the employer had exclusive control of all the instrumentalities and the employee had nothing to do with the rope or construction of the staging, it was held to be a proper case for the application of the doctrine of *res ipsa loquitur*.

In *Rayburn* v. *Penn. R. Co.*, 76 Fed. (2) 505, 506, the plaintiff, an employee of an independent contractor in railroad yards, was hit by a shovel falling from the roof of a freight train. Since defendant had exclusive control, and there was no question of plaintiff's conduct, the doctrine of *res ipsa loquitur* was applied by the court.

In *Doughnut Machine Corp.* v. *Bibbey*, 65 Fed. (2) 635, the lessee of a doughnut machine was injured by reason of a defective condition of the machine. And the petitioner is in error in stating in her brief (pp. 17-18) that "Apparently the present court intended to overrule its own precedent, wherein the question of plaintiff's negligence was left to the jury, while still permitting application of the doctrine of res ipsa." In the *Bibbey* case the court did not permit the application of the doctrine of *res ipsa loquitur* for the reason that there was direct evidence of a defective condition of the machine which caused the injury.

None of the foregoing cases cited by the petitioner is authority for the proposition that the doctrine of *res ipsa*

loquitur is applicable to the facts of a case like the case at bar.

On page 18 of her brief the petitioner quotes a passage from Prosser on Torts (1941 Ed.), erroneously giving the page number. The page is not 330, but 300. This quotation from Prosser does not help the plaintiff, since the plaintiff has failed "to eliminate the *possibility* that it was the plaintiff who was responsible," and has failed to account for the intestate's conduct.

In the case at bar it was the intestate who signaled the engineer where to stop; it was the intestate who threw the hand switch; and it was the intestate who signaled the engineer when to back (R. pp. 12-13, 22-23). The plaintiff has failed to show that the derailment was not due to his control of the switching operation.

Texas & Pacific Coal Co. v. *Kowsikowsiki*, 103 Tex. 173, 174-175.

In her brief, pages 18-19, the petitioner argues in substance that the burden was on the defendant to prove that Jesionowski was negligent. The gist of the argument is stated on page 19 as follows: "The claim that Jesionowski signaled the train to back up before the fourth car in the forward movement had cleared the switch at 'B' was purely an affirmative defense. The burden was on the defendant to prove this alleged fact by a fair preponderance of the evidence." This is erroneous.

The Massachusetts statute and the Federal case cited do not support the petitioner's contention. Those are authorities merely for the proposition that the defendant has the burden of proving contributory negligence. But contributory negligence is not an issue in this case for the purpose of this petition. It is true that the defendant's answer (R.

pp. 5-6) contains the following: "And further answering the second count of the complaint, the defendant says that the plaintiff's intestate was guilty of negligence which was the sole proximate cause of his injuries and death." But this is a wholly unnecessary and immaterial allegation. It is only another way of saying that there was no negligence on the part of the defendant, which is properly raised by the general issue. The defendant's general issue cannot thus be converted into an affirmative defense.

Sweeney v. *Erving*, 228 U.S. 233, 240.

The burden of proof is always on the employee to show negligence of the employer.

Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333, 343.

Baltimore & Ohio R. Co. v. *Berry*, 286 U.S. 272, 276.

St. Louis &c. Ry. v. *Mills*, 271 U.S. 344, 347.

Although the evidence may not have been sufficient to sustain the burden, if the defendant had the burden, of proving that the fourth freight car straddled the switch, it did establish, by way of explanation, the *possibility* of the derailment being the result of the conduct of Jesionowski. And this fact alone is sufficient to defeat the application of the doctrine of *res ipsa loquitur*. See the cases previously cited in our brief, pages 17-23.

2. In arguing the second specification of error (Petitioner's Brief, p. 20) the petitioner contends that the Circuit Court of Appeals was in error because it assumed that "the derailment could not have occurred at any point except the switch." No such assumption appears in the opinion of the Circuit Court of Appeals. The language of

the opinion (R. p. 122) is: "The 'thing' which caused the injury in our case was within the confines of a compound of several elements, *including . . . the switch mechanism . . .*" This is far from saying that the derailment occurred at the switch, although it does take into consideration the *possibility* that the operation of the switch by Jesionowski may have caused the derailment, marks of which commenced at a point 69 feet beyond the switch, going toward Lynn, and continued for 170 feet beyond that (R. pp. 76-77).

The petitioner, in her brief, pages 20-21, further criticizes the Circuit Court of Appeals for its use of the word "thing" in the following sentence: "The 'thing' which caused the injury in our case was within the confines of a compound of several elements, *including* the stopping of the train to begin the switching, the giving of the signals, the throwing of the switch, the backing of the train, the condition of the track and track bed, the switch mechanism, the car wheel flanges and other rolling stock equipment."

It is not the reasoning of the Circuit Court of Appeals which is at fault, but the logic of the petitioner. The petitioner argues that the word "*res*" in the phrase *res ipsa loquitur* means "thing," not "conduct," and then argues that "cases involving the doctrine and its application have dealt with 'things,' inanimate objects, machines, mechanisms; including the inanimate adjuncts of railroads—engines, cars, boilers, tracks, roadbeds, rails, switch points, frogs." The word "thing" as used in the doctrine of *res ipsa loquitur* does not mean inanimate objects as the petitioner claims, but rather means "the occurrence" or "happening" of an accident. And the occurrence or happening of an accident may result from conduct, as well as from defective conditions of inanimate things.

The petitioner cites (Brief, p. 21) the case of *Francey* v. *Rutland R.R. Co.*, 224 N.Y. 482, and sets out a quotation at page 484 of that case. The petitioner, however, does not set out the important quotation in that case, which appears at pages 485-486 as follows:

> "The mere happening of the accident did not necessarily exclude the inference that it might have been caused by the negligence of the plaintiff, or without any negligence at all. It was, therefore, necessary for the plaintiff to supplement the proof of the accident with evidence tending to show that it resulted from the failure of the defendant to exercise ordinary care, either in the selection of the engine or in keeping it in reasonably safe repair.
>
> "In the present case the proof at the conclusion of the evidence was such that the jury might have found the accident was due to either one of two causes—negligence on the part of the defendant in failing to keep the locomotive in repair, or to the negligence of the plaintiff in letting cold water into the boiler in the condition in which it was at the time the explosion took place. Before the plaintiff could recover, therefore, the burden was upon him to prove that the accident was due solely to the first cause. If it were just as probable that the explosion was due to one cause as the other, then he necessarily must fail in the action."

If the doctrine of *res ipsa loquitur* were applicable to the facts of this case it would mean that the *derailment* speaks for itself, not that the switch and other inanimate objects speak for themselves. It follows that the petitioner, having assigned an improper meaning to the ambiguous term "thing," has reached an unsound conclusion.

Moreover, the petitioner entirely ignores the fact that the question of a defective condition of the instrumentalities, including the switch, cars, track and roadbed, and frog, is no longer open to her in view of the jury's verdict for the defendant (R. pp. 9, 98) on the first count of the complaint (R. pp. 2-3), which alleges in substance that the death of the intestate was caused "by reason of a defect or insufficiency due to the negligence of the defendant, in its car, track, or roadbed."

In this connection the Supreme Judicial Court of Massachusetts said, in *Pupageorge* v. *Boston & Maine R.R.*, 317 Mass. 235, at page 239:

> "The verdict for the defendant upon the first count of the declaration which alleged a failure upon the part of the defendant to give the statutory signals required by G. L. (Ter. Ed.) c. 160, § 138, *is not consistent with any contention that can now be made that such signals were not given.*"

See also *Peterson* v. *Boston & Maine R.R.*, 310 Mass. 45, 51.

3. In discussing the third specification of error in her brief, pages 22-25, the petitioner says, in criticism of the portion of the opinion of the Circuit Court of Appeals set out in this specification, that "This statement again disregards the verdict, the finding that Jesionowski was without fault. It substitutes a judicial dictum that Jesionowski could have been at fault. It denies the existence of a fact legally established by the proper fact-finding body."

It is true that the jury is the fact-finding body, but a jury's verdict cannot stand which is based upon conjecture and not supported by evidence.

New York Central R. Co. v. *Ambrose*, 280 U.S. 486, 489-490.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663.

Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333.

Chicago, M. & St. P. Ry. v. *Coogan*, 271 U.S. 472, 478.

Payne v. *Bucher*, 270 Fed. 38, 40.

Mucha v. *Northeastern Crushed Stone Co., Inc.*, 307 Mass. 592, 596-597.

Warner v. *Railroad*, 178 Mo. 125, 133.

Robertson v. *Chicago &c. Ry. Co.*, 225 N.W. 160, 161-162 (Minn.).

The petitioner's argument that Jesionowski was free from fault because of the jury's verdict begs the question. The record is bare of any evidence which would warrant the jury in finding that the accident may not have resulted from Jesionowski's control of the switching operation. It is true, as stated by the petitioner at page 23 of her brief, "that the switch was properly thrown," but it does not appear that it was thrown at the right time. The petitioner has failed, therefore, to eliminate the conduct of Jesionowski as a possible cause of the derailment, even if it were open to the petitioner, in view of the jury's verdict on the first count (*Papageorge* v. *Boston & Maine R.R.*, 317 Mass. 235, 239), to argue that there could be a finding, "under the doctrine of *res ipsa loquitur*, that there was something wrong with the connecting rod, or the switch points, or other switch mechanisms, which caused the derailment."

The petitioner has not made out a case for the application of the doctrine of *res ipsa loquitur* for two reasons: First, because the conduct of Jesionowski has not been

eliminated as a possible cause of the derailment; and second, because the petitioner has entirely failed to show that the defendant had exclusive control of all the instrumentalities, elements, and factors that may have caused the derailment.

It follows upon well-settled principles of law that the reasoning of the Circuit Court of Appeals is sound, and that the errors assigned by the petitioner are without merit.

In that part of her brief entitled "Conclusion" (Brief, p. 25) the petitioner says: " 'The law relating to res ipsa loquitur is replete with conflict, confusion and doubt. There is division of opinion as to circumstances required for its application and still greater disagreement as to the effect given it.' Professor Charles E. Carpenter, in University of Chicago Law Review, vol. 1, 1933, 1934, p. 519."

Whatever conflict, confusion, or doubt there may be as to the doctrine of *res ipsa loquitur* in other aspects, there is no conflict, confusion, or doubt as to the two essential elements involved in the case at bar. Neither textbook writers nor courts of last resort have ever applied the doctrine to facts like those in our case. In the first place, they deny the application of the doctrine unless it appears that the instrumentality or instrumentalities, elements, and factors which may have caused the injury are in the *exclusive control* of the employer; and in the second place, they deny the application of the doctrine in all cases where the accident *may have resulted* from some cause, including the conduct of the employee, for which the employer is not responsible. In both these aspects the burden is on the plaintiff to establish his right to the application of the doctrine of *res ipsa loquitur*.

Conclusion.

Wherefore the respondent prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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